

I.R. NO. 2022-7

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH of MORRIS PLAINS,

Respondent,

-and-

Docket No. CO-2022-059

PBA LOCAL 254,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by PBA Local 254 (Charging Party), alleging that the Borough of Morris Plains (Borough) violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1) and (5), when the Borough did not advance several police officers one step in the applicable salary guide on their respective anniversary dates after the expiration of the parties' January 1, 2018 to December 31, 2020 collective negotiations agreement (CNA) during negotiations for the successor CNA.

The Designee determined that the Charging Party had not established a substantial likelihood of prevailing in a final Commission decision and that irreparable harm would occur because material facts were in dispute regarding the interpretation of several provisions in the expired CNA. As a result, it was not clear whether the Borough was required to pay step increments before the successor CNA was ratified by the parties. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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Appearances:

For the Respondent,
Trimboli and Prusinowksi, LLC, attorneys
(Debra Shannon, of counsel)

For the Charging Party,
Detzky, Hunter and DeFillippo, attorneys
(David J. DeFillippo, of counsel)

INTERLOCUTORY DECISION

PBA Local 254 (PBA or Charging Party) filed an unfair practice charge (UPC) accompanied by a request for interim relief without temporary restraints on September 16, 2021. The charge alleges that the Borough of Morris Plains (Borough) violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a(1) and (5),^{1/} when the Borough did not

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act"; and "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or
(continued...)

advance several police officers one step in the applicable salary guide on their respective anniversary dates after the expiration of the parties January 1, 2018 to December 31, 2020 collective negotiations agreement (CNA). The UPC further alleges that the Borough has refused to advance these officers unless and until a new CNA is negotiated and executed by the parties. The PBA represents all Borough Patrolmen, Sergeants and Lieutenants.

The PBA requests an Order from the Commission compelling the Borough to immediately pay all officers' salary step increments, retroactive to the first pay period in January 2021, due to them under the 2018-2020 salary guide on their respective anniversary dates consistent with the terms of the 2018-2020 CNA and continue to do so until the terms of a new CNA are resolved. The PBA also requests an Order compelling the Borough to comply with any and all other relief which the Commission deems equitable and appropriate.

The PBA submitted a brief, exhibits and a certification from Nicholas Grawehr (Grawehr cert.), police officer for the Borough and the President of the PBA.

On September 20, 2021, I issued an Order to Show Cause without Temporary Restraints with a return date via telephone conference call for October 5th.

1/ (...continued)
refusing to process grievances presented by the majority representative."

In response to the PBA's application, the Borough filed a brief, exhibits, a certification from Ana Thomas (Thomas cert.), the Treasurer/CFO/CTC for the Borough and a certification from Debra Shannon, Esq. (Shannon cert.), labor counsel for the Borough. The PBA then filed a reply brief.

FINDINGS OF FACT

The parties are currently in contract negotiations for a successor CNA. (Grawehr cert., para. 4; Shannon cert., para. 4). The parties' CNA has a grievance procedure that ends in binding arbitration in Article XI, Section C (Step 3). (Borough Exh. 1).

Grawehr certifies the following in pertinent part regarding the salary step progression in the parties CNA:

Article V, Section 1, of the 2018-2020 CNA sets forth the annual salaries of all PBA members and includes a multi-step guide for Patrolmen, Sergeants and Lieutenants, respectively. The aforesaid salary guides are actually included [in] Schedule A attached to the parties' agreement. Pursuant to the grid system for each rank/position, officers not otherwise at top pay, advance horizontally by one column at the end of each contract year and vertically by one step on their respective anniversary date.

For salary step purposes, a Patrolman's anniversary date is his/her graduation from the police academy (or date of hire if he/she had already completed the police academy). For Sergeants and Lieutenants, the anniversary date is the date of said supervisor's promotion to said rank.

[Grawehr cert., para 4, 5.]

Grawehr asserts that Article XIV, Duration, in the CNA

required the Borough to advance affected officers one step in the applicable salary guide on their respective anniversary dates after the December 31, 2020 expiration of the CNA. Article XIV provides the following:

This Agreement shall have a term from January 1, 2018, through December 31, 2020. If the parties have not executed a successor agreement by December 31, 2020, then this Agreement shall continue in full force and effect until a successor agreement is executed. Negotiations for a successor agreement shall be in accordance with the rules of the Public Employment Relations Commission.

[Borough Exh. 1.]^{2/}

Thomas certifies that after the expiration of a previous CNA, an officer was not paid the step increment until the next CNA was ratified:

During 2014, the Borough's contract with the PBA expired (December 31, 2014), and a subsequent agreement was not reached until April 8, 2015.

During the period of January 1, 2015 - April 4, 2015, while there was not a successor contract in place, an officer . . . had a work anniversary on February 25, 2015, and was due a step. The step was not paid at that time.

Once the contract was settled, I prepared retro pay for all officers back to the effective date of the contract, January 1, 2015 which began with the pay period January

^{2/} The parties' January 1, 2012, through December 31, 2014 CNA has the same provision except for the date differences. (Borough Exh. 2).

15, 2015, and went through May 15, 2015. I adjusted . . . [the officer's] pay to reflect his step that was earned on February 25, 2015.

[Thomas cert., para. 3 - 5.]

Article V, Salaries, Sections 1 and 3, sets forth the following:

Section 1: The Salary Guide and annual salaries for the positions of Patrolman, Sergeant, and Lieutenant effective January 1, 2018 through December 31, 2020 are shown on Schedule A attached.

Section 3: All employees shall be in a salary grade as determined by resolution adopted by the Borough Council. All employees including employees promoted during the term of this Agreement shall have an anniversary date as may be determined by the Borough Council by resolution.

[Borough Exh. 1.]

The Schedule A language in the CNA sets forth the salary guide for 2018-2020 and also addresses, in pertinent part, the unique circumstance when an officer who is at top step in his/her rank is to be promoted to a higher rank, but the 1st year of the higher rank is lower than the officer's salary in his/her current rank:

Effective January 1, 2018, and solely during the term of this Agreement ending December 31, 2020, in the event a Patrolman or Sergeant at the top step of the above Regular Salary Guide is promoted to the next rank in title, either Sergeant or Lieutenant, as appropriate, where the salary for the 1st Year in the higher rank in title under the Regular Salary Guide is less than the

officer's prior salary at top step for the lower rank in title, the officer shall receive a salary equal to his or her top step salary at the lower rank plus 2% upon promotion to the higher rank in title.

[Borough Exh. 1.]

On July 15, 2021, Grawehr sent a letter to Thomas regarding the status of step increment payments for several officers (PBA Exh. C). In a July 20th response letter, Thomas stated, "I am not authorized to respond to your letter dated July 15, 2021. Please resort to the contractual grievance procedure." (PBA Exh. D).

As a result, the PBA filed a grievance regarding step increment withholding with the Borough pursuant to the contractual grievance procedure on July 26th at Step 1 (PBA Exh. E; Borough Exh. 3) which was denied by the Chief of Police on July 28th. (PBA Exh. F). The PBA then filed a Step 2 grievance on August 4th (PBA Exh. G; Borough Exh. 5) which was denied by the Mayor on August 24th. (PBA Exh. H; Borough Exh. 6). Thereafter, the PBA filed for binding arbitration on August 25th and an arbitrator was appointed on September 14th. (PBA Exh. I). No date for the arbitration hearing was scheduled as of the return date in this matter.

ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a

final Commission decision on its legal and factual allegations^{3/} and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009), (citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe)); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975). In Little Egg Harbor Tp., the designee stated:

[T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

As set forth above, the PBA has alleged violations of N.J.S.A. 34:13A-5.4a (1) and (5) by the Borough in its UPC.

^{3/} All material facts must not be controverted in order for the moving party to have a substantial likelihood of success before the Commission. Crowe at 133.

N.J.S.A. 34:13A-5.4a(1):

Public employers are prohibited from “[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.” N.J.S.A. 34:13A-5.4a(1). “It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification.” State of New Jersey (Corrections), H.E. 2014-9, 40 NJPER 534 (¶173 2014) (citing New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978)). The Commission has held that a violation of another unfair practice provision derivatively violates subsection 5.4a(1). Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

N.J.S.A. 34:13A-5.4a(5):

Public employers are also prohibited from “[r]efusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. . . .” N.J.S.A. 34:13A-5.4a(5). A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp.,

P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010). The Commission has held that "a breach of contract may also rise to the level of a refusal to negotiate in good faith" and that it "ha[s] the authority to remedy that violation under subsection a(5)." State of New Jersey (Dep't of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[Id. at 404-405.]

The New Jersey Supreme Court in In re Atlantic Cty., 230 N.J. 237, 253 (2017) (a case involving the unilateral withholding of scheduled salary increases during negotiations), relying on the Local 195 three-part test, held that salary step increments are a mandatorily negotiable term and condition of employment

because it is part and parcel to an employee's compensation for any particular year.

The crux of the instant matter is the interpretation of the different CNA provisions set forth above. Atlantic Cty., supra, set forth the standards for contract interpretation in the courts:

It is well-settled that "[c]ourts enforce contracts 'based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract.'" Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118, (2014) (quoting Caruso v. Ravenswood Developers, Inc., 337 N.J. Super. 499, 506 (App. Div. 2001)). A reviewing court must consider contractual language "'in the context of the circumstances' at the time of drafting and . . . apply 'a rational meaning in keeping with the expressed general purpose.'" Sachau v. Sachau, 206 N.J. 1, 5-6 (2011) (quoting Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 302 (1953)). "[I]f the contract into which the parties have entered is clear, then it must be enforced" as written. Maglies v. Estate of Guy, 193 N.J. 108, 143 (2007); accord Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960) ("Courts cannot make contracts for parties. They can only enforce the contracts which the parties themselves have made." (quoting Sellars v. Cont'l Life Ins. Co., 30 F.2d 42, 45 (4th Cir. 1929))). Where an agreement is ambiguous, "courts will consider the parties' practical construction of the contract as evidence of their intention and as controlling weight in determining a contract's interpretation." County of Morris v. Fauver, 153 N.J. 80, 103 (1998).

[Atlantic Cty. at 254, 255.]

The Commission held in State of New Jersey (Corrections)

P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020) regarding the status quo during collective negotiations (a similar case to Atlantic Cty., supra, involving the employer unilaterally discontinuing the payment of salary guide step increments):

"Consistent with the Supreme Court's recent Atlantic Cty. decision, the Commission interprets the status quo during collective negotiations as a continuation of the prevailing terms and conditions of employment established through the expired CNA, past practice, or otherwise."^{4/}

The facts in Atlantic Cty. concerned the contract provisions of three law enforcement units, two in Atlantic County and one in Bridgewater Township and whether the salary increments should have been paid to the employees after the expiration of the respective CNAs. The three CNAs at issue in Atlantic Cty. contained the following contractual provisions in pertinent part:

[T]his agreement shall remain in full force and effect during collective negotiations between the parties beyond the date of expiration set forth herein until the parties have mutually agreed on a new agreement.

* * *

^{4/} Following the quoted language, footnote 6 was inserted, "Prior to the Supreme Court's 1996 decision in Neptune Bd. of Educ. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16 (1996), neither the Commission, nor the courts in Galloway, Hudson Cty., or Rutgers, used the term 'dynamic status quo' or characterized the status quo required to be maintained per the Act as either 'dynamic' or 'static.'"

[A]ll provisions of the Agreement will continue in effect until a successor Agreement is negotiated.

* * *

[A]ll terms and conditions of employment, including any past or present benefits, practices or privileges which are enjoyed by the employees covered by this Agreement that have not been included in this Agreement shall not be reduced or eliminated and shall be continued in full force and effect.

[Atlantic Cty., 230 N.J. at 254-255.]

In the instant matter, the PBA argues that the language in Article XIV, Duration, set forth above, is similar to the contract provisions referenced in Atlantic Cty., and as a result, the Borough was required to pay the salary increments when due after the expiration of the parties' CNA. The Borough disputes the PBA's argument based on the other CNA provisions that apply to the specific years of the CNA (2018-2020), specifically the language in Article V, Salaries, Sections 1 and 3 and the "solely during the term of this Agreement" language in Schedule A.

The Borough also argues that this matter is distinguishable from the facts in Atlantic Cty. because in that case each of the three law enforcement units had a history of the employers paying the step increments at the expiration of the CNAs during negotiations (Atlantic Cty. at 247, 249) and in the instant matter the Borough did not pay the step increments after a previous CNA expired on December 31, 2014 until a subsequent

agreement was ratified by the parties on April 8, 2015. (Thomas cert., para. 3 - 5). The Borough asserts that this created a past practice^{5/} between the parties and the PBA disputes that a controlling past practice was established because it only happened one time and it is not clear if the PBA was even aware of the non-payment at the time it occurred based on the record.

I do not need to reach the past practice issue because I find that material facts are clearly in dispute between the parties regarding the interpretation of the provisions in the expired CNA in this matter.

In State of New Jersey (Dep't of Human Services), supra, the Commission concluded:

a mere breach of contract claim does not state a cause of action under subsection 5.4(a)(5) which may be litigated through unfair practice proceedings and instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures.

* * *

The Act delineates seven unfair practices by public employers, N.J.S.A. 34:13A-5.4(a), as well as five unfair practices by public employee organizations. 5.4(b). The breach of a collective negotiations

^{5/} Regarding the issue of the establishment of a past practice, the PBA cites Somerville Bor., P.E.R.C. No. 84-90, 10 NJPER 125 (¶15064 1984) regarding the definition of a past practice. The Commission held that a controlling past practice is one "[W]hich is repeated, unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." (quoting Elkouri and Elkouri, How Arbitration Works, p. 391 (BNA 1973)).

agreement is not enumerated as an unfair practice. We deem this omission to be significant and to evidence a legislative intent that claims merely alleging a breach of contract based on apparent good faith differences over contract interpretation would not, even if proven, rise to the level of a refusal to negotiate in good faith under subsection 5.4(a)(5). Rather than make such claims the subject of unfair practice proceedings, our Legislature has indicated that such claims must be resolved, if possible, through the parties agreed-upon grievance procedures.

[Id. at 421. Citations omitted.]

The Commission has held that “[b]inding arbitration is the preferred mechanism for resolving a dispute when an unfair practice charge essentially alleges a violation of subsection 5.4a(5) interrelated with a breach of contract.” Hillsborough Tp. Bd. of Ed., P.E.R.C. No. 2005-1, 30 NJPER 293 (¶101 2004).

Additionally, the Commission stated in Camden County and Camden County Prosecutor, P.E.R.C. No. 2012-42, 38 NJPER 289 (¶102 2012), “In State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), we held that allegations setting forth ‘at most a mere breach of contract do not warrant the exercise of the Commission’s unfair practice jurisdiction.’ Contract disputes must be resolved through negotiated grievance procedures.”

Based on all of the above - the material factual disputes regarding the interpretation of the expired CNA

articles; that a final Commission decision may defer this matter to arbitration; that step increments were not paid at the expiration of a previous CNA (which distinguishes this application from the facts in Atlantic Cty.); and given the heavy burden required for interim relief, I find that the PBA has not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain interim relief, and that irreparable harm will occur if the requested relief is not granted.^{6/} Crowe.

^{6/} As a result, I do not need to conduct an analysis of the other elements of the interim relief standard.

ORDER

IT IS HEREBY ORDERED, that the Charging Party's application for interim relief is denied and this matter will be returned to the Director of Unfair Practices for further processing.

/s/ David N. Gambert
David N. Gambert
Commission Designee

DATED: October 22, 2021
Trenton, New Jersey